

GOH KIA CHAI

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v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING

B

MAIRIN IDANG JC

[CRIMINAL APPEAL NO: KCH-42-1-2-2014]

26 JUNE 2014

CRIMINAL PROCEDURE: *Revision - Plea of guilty - Change of plea - Whether consistent - Whether accused understood nature and consequences of plea - Whether plea unreserved, unqualified, unequivocal and unconditional - Whether there was strict compliance with s. 173(b) Criminal Procedure Code - Defence of mistaken identity - Whether considered by trial judge - Whether court exercised its revisionary powers*

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CRIMINAL PROCEDURE: *Plea of guilty - Conviction on plea - Whether accused understood nature and consequences of plea - Whether plea unreserved, unqualified, unequivocal and unconditional - Whether there was strict compliance with s. 173(b) Criminal Procedure Code - Defence of mistaken identity - Whether considered by trial judge - Whether court exercised its revisionary powers*

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The accused/appellant was charged with an offence of voluntarily causing hurt in committing robbery under s. 394 of the Penal Code. The accused pleaded guilty and in mitigation, the appellant mentioned that he thought the victim resembled a lady who had borrowed money from him when he had approached her. However, when he realised that the victim was not the lady who had borrowed his money, he went back to her but was then hit by the public. The Sessions Court sentenced the appellant to seven years' imprisonment with eight strokes of the rattan. Dissatisfied, the appellant appealed against the decision/order of conviction and sentence. The appellant had also prayed for the court's power of revision. It was argued, *inter alia*, that the appellant's plea of guilty was unequivocal in that the court did not ascertain whether he understood the nature and consequences of his plea and had intended to admit, without qualification, the offence alleged against him. Further, there was a change of plea where the appellant had initially pleaded not guilty but thereafter, changed his plea to one of guilty.

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A Held (quashing appellant's conviction and setting aside the sentence; appellant to be re-tried before another Sessions Court Judge):

- B** (1) The revisionary powers conferred by the Criminal Procedure Code ('CPC') exist to correct a miscarriage of justice (*Liaw Kwai Wah & Anor v. PP*; *refd*). (para 3)
- C** (2) The safeguards to be followed when an accused intends to plead guilty are: (i) the court must ensure that it is the accused himself who wishes to plead guilty; (ii) the court must ascertain that the accused understands the nature and consequence of his plea; and (iii) the court must ascertain that the accused intends to admit without qualification the offence alleged against him (*Mohammad Hassan v. PP*; *refd*). On the facts, the learned Sessions Court Judge ('SCJ') did not show strict compliance with the provision under s. 173(b) of the CPC. Further, there was a breach of the safeguards and steps when the appellant's plea of guilty was accepted. There were grave doubts on whether the appellant understood the nature and consequences of his plea. Equally, there were grave doubts that the appellant intended to admit without qualification the offence alleged against him. (paras 11, 13 & 14)
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- E**
- F** (3) There was an unexplained gap when the appellant's plea of guilty was not consistent with his earlier plea of not guilty. The plea of guilty was not unreserved, unqualified, unequivocal and unconditional. Further, based on the appellant's mitigation, the assertion "borrowed money" was consistent with the statement in the victim's impact statement. Thus, the accused may have a defence on mistaken identity. Had the learned SCJ properly explained, taking into account the mistaken identity, the appellant would not have pleaded guilty since he might have a defence to the charge. (paras 13 & 15)
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- H Case(s) referred to:**
Chai Ai Ping v. PP [2010] 1 LNS 92 HC (*refd*)
Goh Keat Peng v. PP [2001] 2 CLJ 498 HC (*refd*)
Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC (*refd*)
Manokaran & Anor v. PP [1978] 1 LNS 118 HC (*refd*)
- I** *Mohammad Hassan v. PP* [1997] 1 CLJ Supp 485 HC (*refd*)
Munandu Sangaran v. PP [1984] 2 CLJ 50; [1984] 2 CLJ (Rep) 273 HC (*refd*)

Legislation referred to:

Criminal Procedure Code, s. 173(b)

For the appellant - Osman Ibrahim; M/s Osman Ibrahim & Co Advocs

For the prosecution - Mahadhir Mohd Khairuddin; DPP

Reported by Kumitha Abd Majid

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JUDGMENT**Mairin Idang JC:**

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[1] On 26 June 2014 I delivered my short decision. I then informed learned counsel for the appellant and the learned DPP that I would provide the grounds of my decision which I now do.

[2] Pursuant to the notice of appeal dated 27 February 2014 the appellant had appealed against the decision/order of conviction and sentence. On reading the petition of appeal dated 14 April 2014 the appellant had also prayed for the court's power of revision and I see no reason why I should not act as such. For the avoidance of doubt let me revisit some of the cases on this matter. In *Manokaran & Anor v. PP* [1978] 1 LNS 118; [1979] 1 MLJ 262 Abdoolcader J said:

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I have however not only extensive powers of revision in criminal proceedings under the provisions of s. 325 of the Criminal Procedure Code but even wider powers conferred by s. 35 of the Courts of Judicature Act 1964 ... I would merely add that in my view notwithstanding the provisions of s. 305 of the Criminal Procedure Code an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity.

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It is true that the matters complained of in this appeal have been brought to my notice by way of a record of appeal and the proceedings before me are headed in the criminal appeal, but, as I pointed out to counsel on both sides at the outset of this hearing, it is nevertheless open to me notwithstanding this to exercise my powers of revision in this matter, and I referred in this regard to the decision of the Privy Council in *In re Chumbidya & Ors* [1934] 62 IA 36 to the effect that when the High Court has before it on appeal a record of criminal proceedings, it can proceed to exercise its powers of revision if it chooses to do so and make the requisite order although precluded by another provision in the Criminal Procedure Code from doing so in the appeal.

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A [3] Our Supreme Court (now Federal Court) in *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 held that revisionary powers conferred by the CPC exist to correct a miscarriage of justice. This is what the Supreme Court said:

B We would also observe that the object of the revisionary powers provided for in the Code is:

C ... to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals. (*Emperor v. Nasrullah & Others* AIR [1928] All 287).

D It is also clear that the High Court may examine the record of proceedings in the subordinate courts 'wherever it considers that in doing so the purpose of justice will be served, as for example, accused is subjected to a vexatious and groundless prosecution'. (*Ramanathan Chettiyar v. Subrahmanya Ayyar* ILR 47 Mad 722).

E [4] Further, in *Goh Keat Peng v. PP* [2001] 2 CLJ 498, our learned brother Zulkefli J (as he then was) said:

F It is to be noted that the relevant provisions of the CPC and the Act (ie, the Courts of Judicature Act) have been enacted with the primary purpose of ensuring proper conduct of the prosecution of an offence and to prevent injustice meted out on any party.

G [5] Having cleared the air so to speak on my power of revision I shall now look at the charge preferred against the appellant which read as follows:

H Bahawa kamu pada 18.02.2014, jam lebih kurang 1315 hrs bertempat di Taka Cake House, Lot 1788-179, Bangunan Hj. Abd Rasit, Jalan Satok, di dalam daerah Kuching, di dalam Negeri Sarawak, telah melakukan rompakan ke atas harta milik Norazizah Binti Ismail (KPT: 7221113075376), dan semasa melakukan rompakan tersebut, kamu secara sengaja telah menyebabkan kecederaan kepada Norazizah Binti Ismail. Kamu adalah dengan ini telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 394 Kanun Keseksaan.

I Hukuman: Hendaklah diseksa dengan penjara selama tempoh yang boleh sampai dua puluh tahun dan bolehlah juga dikenakan denda atau sebat.

[6] On 26 February 2014 having pleaded guilty the learned Sessions Court Judge (SCJ) had sentenced the appellant to seven years imprisonment with a whipping of eight strokes of the rattan. The appellant had immediately engaged the service of Mr Osman Ibrahim to apply for a stay of both the imprisonment and whipping. The same judge who had meted out the sentence had also allowed the application for stay.

[7] Basically the appellant's complaints were that the charge was defective and bad in law; that the plea of guilty as recorded by the court was unequivocal in that the court did not ascertain whether the appellant understood the nature and consequences of his plea and had intended to admit, without qualification the offence alleged against him. The appellant also appealed against the sentence as being manifestly excessive. In my view this appeal can be disposed off on grounds (b), (d), (f) and (g) of the petition of appeal. They are all interrelated which is on the plea taken by the appellant.

[8] To enable me to fully appreciate the complaints of the appellant, let me reproduce herewith the notes of proceeding on 26 February 2014.

[9] The notes of proceedings in verbatim show as follows:

Wednesday February 26, 2014 at 02:30 PM

For hearing.

DPP : DPP Shamira

Accused : Goh Kia Chai – in person (Not represented)

ACCUSED : I confirm that I am not represented by counsel.

Charge U/S. 394 PC read and explained to the accused in Mandarin

ACCUSED : I understand the charge and plead not guilty.

Nature and consequences read and explained to the accused in Mandarin whereby:

If any person in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine or whipping.

- A ACCUSED : I understand the Nature & Consequences and maintain my plea of guilty and I have no objection.

Brief facts read and explained to the accused in Mandarin.

- B ACCUSED : I understand the Brief facts and admit it as correct.

[10] Now what does the law says on accused person pleading guilty. Section 173(b) of the Criminal Procedure Code has laid down the procedure to record a plea of guilty. Section 173(b) of the Criminal Procedure Code states as follows:

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173. Procedure in summary trials

- (b) If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted on it and the Court shall pass sentence according to law:

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Provided that before a plea of guilty is recorded *the Court shall ascertain that the accused understands the nature and consequences of his plea* and intends to admit, without qualification, the offence alleged against him.

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(emphasis added)

[11] When the accused intends to plead guilty it would help to read the case of *Mohammad Hassan v. PP* [1997] 1 CLJ Supp 485 at p. 494, where His Lordship Augustine Paul JC (as he then was) enunciated the three safeguards:

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- (i) The Court must ensure that it is the accused himself who wishes to plead guilty.

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- (ii) The Court must ascertain that the accused understands the nature and consequences of his plea.

- (iii) The Court must ascertain that the accused intends to admit without qualification the offence alleged against him.

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[12] Nearer home the learned judicial commissioner, Datuk Yew Jen Kie (now judge) in *Chai Ai Ping v. PP* [2010] 1 LNS 92, Criminal Appeal No: 42-5 of 2009 had listed the steps to be followed where an accused intends to plead guilty:

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12. In my opinion, the following steps may be adopted in ensuring that the accused understands the nature and the consequences of his plea of guilt.

- (i) For an unrepresented accused, he must foremost be notified of his right to legal representation; and **A**
 - (ii) Where the accused has entered his plea of guilty, the court should inform the accused of the following:
 - a. That he has a right to claim trial; **B**
 - b. The material facts stated in the charge;
 - c. Since has has pleaded guilty, there would not be a trial but he can mitigate later. Thereafter the court may convict him of the offence charged and sentence him immediately; **C**
 - d. The punishment provided under the offence charged;
 - e. After ascertaining the accused has understood all the above (a) to (d), the accused should be asked whether he still wish to plead guilty; **D**
 - f. If the accused still wish to plead guilty, the prosecution will proceed to tender the facts of the case, the contents of which must be read and explained to the accused in the language he would understand. **E**
 - g. If there is dispute on the facts of the case, the disputed portion should be resolved.
 - h. Where the accused has understood and admitted the facts as correct, the prosecution will proceed to tender the exhibits, the same have to be shown and explained to the accused. **F**
 - i. After the accused has admitted the exhibits to be correct, he will be asked to mitigate. **G**
 - j. If the mitigation does not render the plea unequivocal, the court will proceed to convict the accused of the charge preferred against him and sentence him accordingly.
- [13]** I have gone through the notes of proceeding and being guided by *Mohammad Hassan v. PP, supra* and *Chai Ai Ping, supra*, I find that the learned SCJ had not shown strict compliance of s. 173(b) of the Criminal Procedure Code. The learned SCJ had not considered the “safeguards and the steps” leading to the appellant pleading guilty. From the notes of proceedings the accused could not have or had not pleaded guilty to the charge. It is not clear what was the nature and consequences that was

- A read and explained to the accused in Mandarin. It is also not known what the accused had understood as being the nature and consequences to maintain his plea of guilty. I am in doubt whether it was the “charge” or the “plea”. I find that the appellant “maintain his plea of guilty” was not consistent with his plea of
- B not guilty earlier on. There is therefore this unexplained gap. There was no plea of guilty in the first place to warrant the appellant maintaining the plea of guilty. There was nothing in the notes of proceeding that would explain this anomaly. I ask myself what had transpired from the initial plea of not guilty to one of
- C maintaining the plea? Now learned counsel for the appellant’s explanation was that the appellant had initially pleaded not guilty but at the behest of the prosecution officer there was then a short adjournment (although this was not stated in the notes of proceedings) and it was during this time that the investigation
- D officer had persuaded the appellant to change his plea to one of guilty on the investigation officer assurance that the appellant would get a lighter sentence being a first offender and due to his sickness (suffering from epilepsy). But my concern is this. Why was no plea taken when the appellant had decided to change his
- E earlier plea of not guilty to a plea of guilty.

[14] On the facts and circumstances of this present revision, I am satisfied that there was a breach of the “safeguards and the steps” when the plea of guilty of the appellant was accepted.

- F There were grave doubts that the appellant understood the nature and consequences of his plea. Equally, there were grave doubts that the appellant intended to admit without qualification the offence alleged against him.

- G [15] In the instant case, I am of the view that the plea of guilty by the accused was not unreserved, unqualified, unequivocal and unconditional (See *Munandu Sangaran v. PP* [1984] 2 CLJ 50; [1984] 2 CLJ (Rep) 273). In fact, in mitigation the appellant had stated that the appellant thought the victim resemble a lady that had borrowed money from him and the appellant had approached
- H her to pay him back. When the appellant realised the victim was not the lady that had borrowed his money he went back to her but was then hit by the public. This assertion (borrowed money) by the appellant was consistent with the statement in the victim’s impact statement. This should have been clear to the learned SCJ
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that the accused may have a defence on mistaken identity. Had the learned SCJ properly explained taking into account the “mistaken identity”, the appellant would not have pleaded guilty since the appellant might have a defence to the charge after all.

[16] For reasons stated hereinabove in exercise of my revisionary power I quash the conviction and set aside the sentence. The appellant is ordered to be re-tried before another SCJ and is to appear in the Sessions Court this morning for that purpose. In arriving at my decision, I have also considered the parties’ submissions and authorities cited therein.

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